JD–56–06
Plymouth, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE WACKENHUT CORPORATION

and Case 1–CA–42837

MARK SHEAN, an Individual

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Of Boston, Massachusetts
For the General Counsel

Mark Shean, an Individual
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For the Charging Party

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For the Respondent Employer

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on May 1, 2006. The charge was filed by Mark Shean on October 6, 2005, and amended charges were filed by him on January 30 and February 9, 2006. A Complaint and Notice of Hearing was issued on February 23, 2006. The Complaint alleges that The Wackenhut Corporation (herein the Respondent or Wackenhut) discriminated against Shean by refusing to rehire him in violation of Section 8(a)(1) and (3) of the Act. The Respondent filed a timely answer admitting the jurisdictional allegations of the Complaint and that International Union, Security, Police and Fire Professionals of America, Local 540 (herein the Union) has been a labor organization within the meaning of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with offices and places of business throughout the United States, has been engaged in providing guard and security to clients throughout the United States, including Entergy Nuclear Generation Company, which operates Pilgrim Nuclear Power Station (herein Pilgrim) in Plymouth, Massachusetts. The Respondent admits and I find

that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Complaint raises two questions: 1) Did the Respondent's Pilgrim Project Manager Robert Voegtlin tell the Union's president, Desiree Sullivan, that the Respondent would not rehire Mark Shean because of his Union activities? 2) Did the Respondent refuse to rehire Shean because of his Union activities? I believe the answer to both questions is yes, but one need not find that Voegtlin made the alleged admission in order to find that the Respondent did indeed refuse to rehire Shean because of his Union activities.

A. The Relevant Facts Adduced in this Case

1. Mark Shean's previous employment at the Pilgrim facility

Mark Shean worked as a security officer at Pilgrim from March 1987 until July 2004. In that position he worked for several companies, including the Respondent, who successfully bid for the job of providing security at the facility.[1] In his job, he was engaged in protecting the public and the facility's employees. He also served for a number of years as Security Safety Officer, a volunteer position that promoted safety and tried to anticipate safety issues before they became a problem. During his last year at Pilgrim, his hours were 6 am to 6 pm, 5 days a week for a 60-hour week that included 20 hours of overtime. His rate of pay was a little in excess of $18.00 an hour. His chain of command in ascending order consisted of: Officer in Charge, Roger Gronldom; Operations Manager Jim Christie; Project Manager, Edward Neary and his successor Robert Voegtlin; Director of Nuclear Operations Tom Grossel, and Vice President of Nuclear Operations Fred Harper.

The written, objective evidence of record indicates that Shean was a good employee. In 2003 and 2004, he won certificates of achievement for marksmanship from Wackenhut. His performance reviews for 1990 to 1993 place him just below the "Exceptional" ranking, the highest ranking. In 1996 and 1997, he was commended for his work in the area of safety. The performance reviews are the most recent conducted by Wackenhut. The Respondent did not continue its employee review program when they took over again in 2003. During all Shean's years at the Pilgrim nuclear facility, he was disciplined only one time, for refusing mandatory overtime. This discipline "went away" according to Shean because there were mitigating circumstances. There is absolutely nothing in his work record that would rationally preclude his rehire by the Respondent.

For reasons unrelated to his work at Pilgrim, he resigned in July 2004 and moved to Arizona with his wife to pursue a new career. He gave written notice on July 20, 2004, and his last day of employment with the Respondent was July 28, 2004. The Respondent and Shean completed forms related to termination that reflect, inter alia, that he was eligible for rehire and that Shean quit/retired with proper notice. Shean did not complete an exit interview. He testified that he was not asked by management why he was quitting and he did not say. The forms he filled out for separation indicate that his reason for leaving was relocation.

[1] Wackenhut first secured this contract in June 1988 and held it until August 1994. It was again the successful bidder for the contract in February 2003 and has held it since that date.

His career change did not work out as planned in Arizona and he and his wife moved back to New England at the end of the summer of 2004. They settled in Maine and Shean found work with Home Depot. He and his wife moved back to the Plymouth, Massachusetts area in March 2005, and Shean found work with an area Home Depot. He is currently working as a baggage and passenger screener for the Transportation Security Administration at Boston's Logan Airport.

2. Shean's involvement with the Union and his Union activity

While Shean worked at the facility, the security employees were represented by the Union. Shean was active in the Union, serving at various times as a steward, sergeant-at-arms, recording secretary, and from June 2003 until March 2004, as president. He was preceded in that post by James Merada and was succeeded by Roy Rose. While president, Shean was the chief Union negotiator for a contract with the Respondent which became effective February 17, 2003, for a period of 3 years. The contract was signed on September 30, 2003, and made retroactive to February 2003. The negotiations for this contract were extremely contentious. According to Shean, the Respondent unilaterally implemented mandatory overtime and a scheduling plan called the A/B plan, which caused employees to lose money and created other hardships for them. Shean testified that Wackenhut was not bargaining in good faith during these negotiations. Wackenhut's Vice President Fred Harper participated in these negotiations for Wackenhut.

In response to the Company's bargaining tactics, Shean had the Union set up an informational picket at the facility for about a week in June 2003. About 30 people participated in the picketing daily. Additionally, in his role as Union president, Shean wrote letters to area newspapers and gave interviews to local media which made their way into the public consciousness over the summer of 2003. The letters and media interviews were all very critical of the Respondent and its management. The letters also indicated that the Union was contemplating a strike. In some articles published about the negotiations, the Respondent blamed the Union for not bargaining in good faith. A strike vote was taken at the end of July 2003 and the Union employees authorized a strike if their Union leaders thought it in their best interest. In most, if not all, of the articles written about the negotiations, Shean is the face and name associated with the Union's position.

Some examples of Shean's quotes to the media in interviews and letters to the area papers are set out below. In an April 26, 2003 letter to the editor, Shean wrote:

> "Wackenhut decided to start negotiations in bad faith by proposing an $11,000 pay cut per man per year back in February, we voted no to this as anyone of clear mind would. Since then they have stalled talks with us, a practice they employ to cause unrest and apprehension. To better make people cave to their ludicrous proposals by fearing replacements by scabs, if a strike were to be the outcome of Wackenhut's failure to bargain in good faith. Something I believe the owners of the plant have given them permission (in the name of profits) to do."

In a later July 16, 2003 article, Shean is quoted as saying "This is not over economics. This is quality of life. They want to own us." Then, in a July 19, 2003 letter to the editor, Shean makes a security/public safety appeal to the public. He ends his letter with this quote, "If you feel that safety is important and not something to be sacrificed on the alter of corporate greed, then call the vice president of nuclear here at Pilgrim Station, Mike Balduzzi. It is your town, it is your safety. Pressure Mr. Balduzzi to make Wackenhut come to the negotiating table. The next time

we are out at 3A it will be on a round the clock strike." Shean signed the letter as president of Local 540.

Shean denied ever saying that he was biased against Wackenhut or that he hated Wackenhut. He testified that his objective was to get Wackenhut to the table and negotiate a contract. In fact, the only disparaging remarks about Wackenhut that have been proven in this record by credible evidence are found in the written articles, interviews, letters, and memos that are exhibits in this record. None of the witnesses testifying could personally establish that Shean made disparaging remarks about Wackenhut to them or in their presence. All of the exhibits which contain these remarks were created at a time when Shean was Union president and represented the position of the Union's leadership and thus, the Union.

The Respondent introduced two letters written to Wackenhut by Shean in his position as Union president. The first is dated October 14, 2003, and was addressed to Project Manager Ed Neary. This letter complains of what Shean calls a unilateral change in working conditions in violation of the parties' contract and the National Labor Relations Act. The second is a letter dated October 27, 2003, and is addressed to Wackenhut's Vice President for Labor Relations, Guy Wegener, at Wackenhut's corporate headquarters in Florida. This letter reads:

> "In response to your October 20, 2003 letter to 'concerns received', it is this Local's view that these so-called anonymous callers to your ECP hotline is further evidence of Wackenhut's continuous campaign of misrepresentation and distortion toward this Local. Going back to our first meeting in January of 2003, the Wackenhut Corporation has engaged in a relentless pursuit of union-busting activities all aimed at undermining this Local and the men and women it represents. You have truly earned the reputation as a company that spreads hate and discontent wherever you locate.
>
> However, what this Local does know to be true concerning coercion and intimidation are the formal complaints made to the Nuclear Regulatory Commission (N.R.C.) by this Local concerning the Wackenhut's treatment of its employees. These charges were filed in August of 2003 with additional information submitted more recently. In correspondence with this Local, the N.R.C. has stated the investigation is ongoing.
>
> Mr. Wegener, internal matters of this Local will be dealt with according to this Local's bylaws as well as our International Constitution and are not a concern of a suspect Company like yours."

Shean testified that his letter was sent in response to Wackenhut spreading word among the Pilgrim security employees that it had received anonymous phone calls that the Union leadership was coercing members not to do things that Wackenhut wanted them to do. Shean viewed this activity as aimed at breaking up the Union.

On October 24, 2003, Shean, in his position as Union president, issued the following internal Union letter to all members of Local 540:

> "In the last couple of weeks you have seen for yourselves the depths that Wacky will go. Wacky drops subtle lies as in their memo dated 10-14-03 that a limited number of personnel had already put in for the schedule change. This tactic is of course designed to panic the rest of us 'cattle' to stampede and do the same. We demonstrated we are stronger than that; by the simple fact that there was no stampede. Then there was the memo dated 10-20-03 that claims many anonymous calls and letters have gone to Wacky's headquarters in Florida, by people who felt intimidated by this local into not

taking the 1500.00 dollars or the A/B schedule. More propaganda from wacky Wagner to split this union. Nothing need be substantiated when it is conveniently anonymous. I for one do not believe a word of it. I do not, I can not, I will not believe for one second that there may be a few among us trying their best to bring harm to each and every member of this local and subsequently their families, by crawling so disgustingly low as what Wacky suggests. I do not believe it possible that they could move among us completely undetected by the majority. Dirt bags like that would have already been found out and shunned by this membership by now. Therefor, you can not believe a word Wacky tells you in their slimy tricks to divide this local. In my experience with Wacky now, and over past years I have come to understand just how much contempt Wacky has for working men and women trying to provide for their families. And I know this for a fact, if Wacky thought for one nano-second that they were right, they would offer 15 cents, let alone 1500.00 dollars, they would steam roll us in a heart beat. If it comes to it the law says we must comply while we fight violations to the CBA. It will be gratifying to see the law force Wacky to comply with the CBA for a change. The A/B schedule represents a substantial financial hardship that brings us in pay back to 1996, this is not only unacceptable, in this economy, would be criminal. Let us all stay strong and united in this struggle with unscrupulous men and the companies they run."[2]

All of Shean's statements and comments noted above and the others noted in the exhibits in this record where known to every member of Wackenhut's management who played any role in the decision not to rehire him at the time that decision was made. I find that Shean's speech was clearly protected. Although it is true that certain appeals made to the public could lose their protection, it will be protected if the speech indicates that it is related to an ongoing dispute between the employees and the employer and the communication is not so disloyal, reckless or maliciously untrue as to lose the protection of the Act. *Endicott Interconnect Technologies, Inc.,* 345 NLRB No. 28, 4 (2005), citing *NLRB v. Electrical Workers Local 1129 (Jefferson Standard)*, 346 U.S. 464 (1953). The definition of labor dispute as it applies to this kind of speech does not require an ongoing strike or picketing. Rather, "all that is required is a controversy that relates to terms and conditions of employment." Id. at 5. All the documents in the record in this case in which Shean made appeals to the public fall within the Act's protection, since they reference an ongoing labor dispute and are not disloyal, reckless or maliciously untrue and the Respondent has never claimed otherwise.[3]

3. Shean's attempts to get rehired by Wackenhut

In May, 2005, Shean responded to Wackenhut newspaper advertisements and a tip from current Union President Desiree Sullivan and applied with Wackenhut for rehire.[4] Sullivan told

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[2] Spelling, punctuation, and form in the quoted material are exactly as they appear in the material.

[3] In *El San Juan Hotel,* 289 NLRB 1453 (1988), a leaflet addressed to all employees found protected as it concerned an ongoing labor dispute and refers to abuses against employees and to wages, notwithstanding it accused a trustee of the employer of being irresponsible, a dictator, or wanted to close the hotel, and of being in a position to gain financially from the hotel's closure. See also *Allied Aviation Service Company of New Jersey, Inc.,* 248 NLRB 229, 231 (1979), enfd. 636 F2. 1210 (3rd Cir. 1980), where letters to customers concerning safety matters were found to be protected when related to legitimate, ongoing labor dispute and there was no malicious motive.

[4] After Shean left Wackenhut in 2004, there was an internal Union upheaval that resulted in the employees seeking representation by a different union. The involved Wackenhut employees

Continued

him that Wackenhut was training a new class of security guards beginning in June 2005. On May 31, 2005, Shean called Dianna Delph-Davis in the Respondent's Administrative Office and told her of his interest in coming back to work with the Respondent. Delph-Davis said she would give this information to current Project Manager Voegtlin. On the following day, Shean found a message on his voice mail from Delph-Davis saying that he had not been hired for the June class, but that if he were still interested in being rehired, to let her know. Shean called back and left a message for Delph-Davis indicating his continued interest.

Also on June 1, 2005, Shean called Sullivan and expressed his surprise in not being rehired as, to his knowledge, everyone who had previously left Wackenhut's employ on good terms had been rehired if they applied. He also asked Sullivan to inquire at her next meeting with management why he had not been hired for the June class.[5] She reported back to him later that he needed to submit a resume. He found this strange as he had worked at the Pilgrim facility for 17-1/2 years and assumed there was a substantial file detailing his employment at the facility. In any case, he did submit a resume that was hand delivered to Delph-Davis by Sullivan on July 26, 2005. This resume appears normal and complete though Shean chose to end it with an entry reading "1955 – present All around nice guy." As will be seen later, Shean made some other strange choices when filling out paperwork related to his job application.

Sullivan testified that she did have a meeting with Voegtlin, Christie and Grossel in June as part of regular Union–management communications. At this meeting she asked why Shean had not been rehired, saying that it did not make sense (not to rehire him). According to Sullivan, Christie said, "We feel we've selected the best qualified candidates." Sullivan argued with him pointing out Shean's long tenure at the facility and his extensive qualifications. In response, management told Sullivan to have Shean reapply. She then asked Shean for a resume and gave it to Delph-Davis.

Voegtlin testified that at this meeting Union official Ken Presley, not Sullivan, asked Grossel what was up with Shean's hiring. According to Voegtlin, Grossel asked if Shean had filed an application and Voegtlin said he had not. Grossel then told Presley to tell Shean to file an application and he would review it. He denied that the conversation about Shean went any further. I do not find it necessary to decide who actually said what in this meeting. Both sides agree that the matter of Shean not being rehired came up and the result was that the Union officials were told to have Shean apply for a job.

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are now represented by United Government Security Officers of America, Local 25 and Sullivan is president of the new local. She is a 4-year security officer at the Pilgrim facility and was also president of the former Union at the time of the change. She testified that she was also a Union officer when Shean was president. After Shean's term as president ended, Roy Rose was elected president. Sullivan testified that for some time Rose had accused the Union leadership of stealing employees' money. After Rose became president, he complained to Wackenhut that he was being harassed by other Union members. Some members filed charges against Rose with the Union's International complaining that Rose was not working in the best interests of the membership. All of these charges and countercharges led to a split in the Union with Sullivan and her supporters on one side and the Rose group on the other. Respondent's counsel suggested that Sullivan might manufacture testimony on behalf of Shean to get him back at Wackenhut to lend her support.

[5] The best evidence would support a finding that Shean would not have been hired with the June class, regardless of his Union activity, because that class had already been selected when he made his interest known.

In response to his resume and other indications of his continuing interest in being rehired, Shean received a card from the Respondent in August 2005. This card stated that Wackenhut was hiring a new class of guards in September and giving him two dates, August 30 and September 1, 2005, on which he could come to a designated site and complete a job application form. He responded and went to the site on August 30. At the site he filled out some forms. One of them was a form that listed job duties involved with the position of an armed security officer. He checked off each duty listed as he had performed these duties in the past, and wrote on the form, "Been there, done that." He also filed out an application form that, inter alia, called for personal references. Rather incredibly, he listed as three such references former Union officers who had been fired or suspended for cause by Wackenhut. He knew they had been fired or suspended at the time he filled out the application form. The adverse personnel actions had been taken by Wackenhut during a time of a bitter internal Union dispute. These three men were James Merada, Louis Ottino. and Tim Charette. Shean testified that by naming Merada and Ottino as references, he was not trying to embarrass the Respondent, saying he had known them for years as good employees and good Union men. He added he had no problem with naming them as references.

The terminations of Merada and Ottino and the suspension of Charette were the subject of a complaint issued by the Board. Merada and Ottino were severed from this Complaint as they chose to arbitrate their terminations.[6] The arbitrator issued a decision dated October 15, 2005, revoking the terminations, ordering reinstatement, and converting the terminations to unpaid suspensions for designated durations. Though the Respondent reinstated Merada, he was not allowed back at the Pilgrim facility as the facility's operator, Entergy, denied him access to the facility. He now works at another Wackenhut location. Ottino never followed up on the arbitration award seeking reinstatement and is not working for Wackenhut. A decision of an administrative law judge issued January 26, 2006, found Charette's suspension to be motivated by the Respondent's aversion to Charette's protected activity and thus unlawful under the Act. Shean also originally listed as a reference current Union President Desiree Sullivan. At some point, he lined out Sullivan as a reference and put in the name of a Wackenhut security officer unconnected with the Union.

Shean testified that he could have been rehired outside of a class of new-hires. He testified that in June 2005, many of his certifications were still current. Many aspects of the security officer job require annual or otherwise periodic formal recertifications. It is unclear from the record which of Shean's certifications were still current as it appears that many of them had last been given in March 2004 and would have expired by June 2005. It certainly appears that he would have had to have undergone a period of retraining, whether in a class or individually, before he was fully qualified to resume his former duties with Wackenhut.

Shean named two security officers who had quit and been rehired outside of a new class. They were James Feid and Eric Rezendes. Feid was rehired within 7 months of his quit date and Rezendes was rehired within 2 months of quitting. During his period away from Pilgrim, Feid held a security officer position with another nuclear power plant. Fifteen June applicants were offered employment and 16 applicants were offered employment in September. Of the September applicants, two did not complete the requirements to become permanent employees.

[6] In June 2005, Shean went to the arbitration and was seen talking with Merada and Ottino. He did not sit in on the hearing.

Sullivan testified on this subject and named in addition to Feid and Rezendes, a Ryan Savjay, who quit Wackenhut for over a year and had recently been rehired. She also named Chris Maher as an employee who had quit for a couple of months and was currently in the process of being rehired. She also said employees had quit in prior years and had been rehired, naming Jon Brown, Paul Bradford and Dean Amore. She also testified that Eric Rezendes was rehired though he was counseled upon rehire by Voegtlin about his attitude in his earlier employment with Wackenhut. She learned this from Rezendes and asked Voegtlin about it. Voegtlin told her that Rezendes had had what he termed a "short timer's" attitude before and he wanted to counsel him about that attitude before he resumed working for Wackenhut. Rezendes was not a Union officer in his prior Wackenhut employment. Voegtlin testified that Rezendes had had attendance issues in his previous employment. Voegtlin also testified that employees named Jacqueline Bizzozero and Melody Blucher applied for rehire at some point and were not rehired.

I am not convinced that Shean could have been rehired without going through the training given new hires. Having said that, there is absolutely no valid reason given in this record for not hiring him for the September class. There was no attempt made to demonstrate that those persons hired in September were more qualified than Shean. Since filing his application for the September class, Shean has not heard from the Respondent even though he subsequently indicated to Wackenhut his desire to be rehired.[7] The Respondent hired another class of security officers in January 2006.

4. The Respondent's response to Shean's attempt to be rehired.

Shean was not hired by the Respondent for the September class of new security officers. In late September 2005, Shean was told by Union President Sullivan that Project Manager Voegtlin told her that Grossel and Harper would never hire Shean back at Wackenhut because of his Union activities. Sullivan testified about this conversation. She testified that in late September, she had a conversation with Voegtlin on another subject, then she asked why Shean had not been hired with the September class. According to Shean, Voegtlin said he was aware that Shean was not rehired and stated: "Well, the powers that be have already told me that Mark won't be hired." Sullivan asked who were the powers that be and Voegtlin replied, "Grossel and Harper." Sullivan asked why Shean would not be rehired, and Voegtlin stated, "Because of his Union affiliation." Sullivan said that they could not do that. Voegtlin then said, "The bottom line is they're not going to tolerate dissention." According to Sullivan, Voegtlin did not elaborate on what he meant about dissention.

Voegtlin was asked by the Respondent's counsel if he ever told Sullivan "the powers that be have decided that Mr. Shean would not be allowed to come back because of his Union activity. Voegtlin testified that he did not make such a statement. He also denied telling Sullivan that dissent would not be tolerated at Pilgrim Station. Voegtlin also denied ever discussing Shean's Union activities with either Harper or Grossel.

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[7] In addition to filing a charge with the NLRB, Shean also filed an age discrimination complaint with Massachusetts' Commission Against Discrimination. The Board has rejected the argument that an employee's filing an age discrimination case and NLRB case at the same time is inconsistent. In *Pace Industry, Inc.,* 320 NLRB 661 (1996), the Board noted, "we see nothing inconsistent in alleging race or age discrimination in one forum and discrimination based on union membership in another. The individuals in question may have believed in good faith that the Respondent had more than one illegal motive for declining to hire them." Thus, I find that that Shean's MCAD claim has no bearing on this proceeding.

Voegtlin testified that he had the final authority when it came to new hires at the Pilgrim facility. For new hires, once the applications are reviewed by Voegtlin, administrative personnel, and the office manager, those considered good enough to hire are given interviews. From this group, employees are hired. He testified that the decisions about rehires are made at the corporate level by Director of Nuclear Operations Tom Grossel and Vice President Fred Harper. Voegtlin testified that at some point after Shean had expressed his desire to be rehired, Harper stated, "I can't believe that. He wants to come back here? All he ever said was terrible things about the Company, disparaging remarks and so forth." From Harper's words, Voegtlin assumed that Shean would not be rehired. The only disparaging remarks about Wackenhut that Voegtlin could remember were always in the context of Union activities. Voegtlin explained that in the summer of 2003, it was very contentious at Pilgrim and there were a lot of divisive issues. He testified that Shean was in the forefront of campaigning for his (the Union's) take on the issues. According to Voegtlin, Shean had some "pretty unflattering things to say about the Company." Voegtlin added that Shean referred to Wackenhut Corporation as Wacky. He noted that the Union sent a letter to Entergy when Wackenhut was awarded the Pilgrim contract expressing dismay and calling Wackenhut anti-labor and anti-people and alleging that Wackenhut sows hate and discontent. This letter is not in evidence and may or may not have been written by Shean.

After Voegtlin received Shean's application, he spoke with Grossel about it. According to Voegtlin, after looking at the application, Grossel pointed out that Shean had listed terminated employees Ottino and Merada as references. According to Voegtlin, Grossel then "kind of huffed a little bit and he shook his head. And that was that." Grossel testified that he took the entries that Shean had made as a "slap in the face to Wackenhut," and they would be a relevant factor in the decision of whether to rehire Shean. However, Grossel testified that he did not make that decision. Grossel agreed there was nothing in Shean's personnel file that would warrant not rehiring him.

I credit Sullivan's testimony about her conversation with Voegtlin about the reason why Shean was not rehired. Her testimony is consistent with what the Respondent has advanced as the reason for Shean not being rehired. The disparaging statements made by Shean which form the basis for the Respondent's decision not to rehire him are all protected Union activity. That the Respondent refuses to accept this and sees them as only the statements of a disgruntled employee is not a defense. The statements were protected Union activity and Shean was clearly not hired back because he made them. Thus, Voegtlin was telling Sullivan the truth when he indicated that Grossel and Harper would not rehire Shean because of his Union activity. Voegtlin's own testimony is consistent with Sullivan's version of the conversation in that the reasons he advanced for Shean not being rehired describe protected Union activity, even though he chose not to so label it in his testimony.

A statement by a high level manager to an employee that another employee will not be rehired because of his union activity and that dissention will not be tolerated is clearly coercive. In *Aero Metal Forms,* 310 NLRB 397, 400 (1993), for example, the Board found that a supervisor's statement to an employee linking the layoff of another employee to the union activity of the laid-off employee's father, had the tendency to coerce the employee in the exercise of her Section 7 rights and was a violation of Section 8(a)(1) of the Act. Voegtlin's statements to Sullivan likewise violate the Act.

Harper testified that when he learned of Shean's desire to be rehired in June 2005, he said "Why would he want to do that?" Harper explained that Shean was not overly fond of Wackenhut and it was fairly well known that he did not care for the Company. He testified that

he had conversations with three or four employees and a couple of supervisors who told him that Shean did not like the Company and was discontented with Wackenhut as his employer.[8] The purported conversations took place from 2003 to 2004, a time frame in which Shean was Union president and when the relationship between the Union and Wackenhut was contentious. Harper testified that Shean verbalized his discontent to the other Union employees and this greatly concerned him. Harper added, it (Shean's verbalization of his discontent with Wackenhut)becomes a grave concern with him if disparaging comments are made about the organization, as the organization was looking for people who would represent the Company and do their jobs effectively. He was also concerned that making disparaging remarks about the Company would lead to a greater turnover in personnel. On the other hand, Harper testified that all of his personal conversations with Shean were amiable and Shean did not verbalize his discontent to him.

Harper made the decision not to rehire Shean. When asked why, he answered, "As I stated earlier I was surprised that based on his feelings for the Company that he would even want to consider coming back. And I'm concerned about the employees, the morale, etc. It's almost like a cancer in the organization and a battle I don't particularly want to fight – to sell our Company. That we're a good Company here to represent our employees." Harper denied that Shean's Union activities had anything to do with the decision not to rehire him. Harper admitted that some of his conversations with employees could have occurred during contract negotiations. He also admitted to being aware of Shean being named in newspaper articles during the negotiations and of his role in the informational picketing campaign by the Union. He learned of some of this from others in Wackenhut's management as he was based in Florida at the time and did not receive Massachusetts's newspapers or see or hear Massachusetts' television or radio stations. Shean was never disciplined for making any disparaging remarks about the Company. Harper denied that putting Merada and Ottino on Shean's application played a role in the decision not to rehire Shean. He was unaware that Shean had listed them as references. When asked by his counsel if it would have played a role if he had known about it, Harper testified that he could not say that it would, standing alone, cause him not to rehire Shean.

B. Conclusions about the Alleged Violations

I have above found Voegtlin's statements to Sullivan to violate the Act as alleged in the Complaint. I have found that the Respondent's decision not to rehire Shean was motivated by its aversion to Shean's protected Union activity and for no other legitimate business reason. The Board has developed a clear framework for analyzing cases involving alleged discriminatory refusals to hire job applicants. In *FES,* 331 NLRB 9, 12–15 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002), the Board held that the General Counsel must initially demonstrate that the employer was hiring or had concrete plans to hire during the period under consideration, that the applicants possessed the qualifications announced by the prospective employer (or that such announced criteria were inconsistently applied or merely pretextual), and "that antiunion animus contributed to the decision not to hire the applicants." If the General Counsel's evidence meets this initial test, the burden shifts to the employer to demonstrate that it would not have hired the applicants for reasons apart from their union support or activities.

[8] Harper testified that the name of Tim Charette also came up in these conversations as a person discontented with Wackenhut. As noted elsewhere in this decision, Charette was found by a Board judge to have been unlawfully suspended by the Respondent in 2005.

As set out above, the General Counsel has met the burden set by *FES* in every respect. I find that the Respondent has not demonstrated that it would not have hired Shean absent his Union or other protected activity. Indeed, this activity appears to be the sole reason he was not rehired. Therefore, I find that Respondent's refusal to rehire Shean was unlawful in violation of Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. The Respondent, The Wackenhut Corporation, is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to hire or rehire Mark Shean because of his union affiliation or other activities protected by the Act.

4. Respondent has violated Section 8(a)(1) of the Act by making statements to employees linking employee union activity to the failure to hire or rehire employees and stating that dissention will not be tolerated.

5. Respondent's unfair labor practices affected commerce within the meaning of section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire or rehire Mark Shean, it must offer him immediate employment without prejudice to his seniority or any other rights or privileges he would have enjoyed had the Respondent hired him when he applied. If the position for which Shean should have been hired no longer exists the Respondent shall offer him immediate employment in a substantially equivalent position without prejudice to his seniority or any other rights or privileges he would have enjoyed had the Respondent hired him when he applied. The Respondent shall make Mark Shean whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9]

The Respondent shall remove from its files any reference to the unlawful refusal to hire Mark Shean and notify him in writing that this has been done and that the unlawful refusal to hire will not be used against him in any way. Respondent shall also post an appropriate Notice to Employees.

[9] At the compliance stage of this proceeding, it can be determined the most likely date that Shean should have been rehired. It should be no later, however, than September 26, 2005, when the Respondent hired a number of employees in the position for which Shean applied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, The Wackenhut Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Failing and refusing to hire or rehire applicants on the basis of their union affiliation or other protected activities.

b. Making statements to employees linking employee union activity to the failure to rehire employees and stating that dissention will not be tolerated.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days of this Order, offer Mark Shean immediate employment without prejudice to his seniority or any other rights or privileges he would have enjoyed had the Respondent hired him when he applied. If the position for which Shean should have been hired no longer exists the Respondent shall offer him immediate employment in a substantially equivalent position without prejudice to his seniority or any other rights or privileges he would have enjoyed had the Respondent hired him when he applied.

b. Respondent shall make Mark Shean whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to hire Mark Shean, and within 3 days thereafter notify him in writing that this has been done and that the unlawful refusal to hire will not be used against him in any way.

d. Within 14 days after service by the Region, post at its Plymouth, Massachusetts facility, copies of the attached notice marked "Appendix."[11] Copies of the notice, on

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 31, 2005.

e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 15, 2004

_____
Wallace Nations
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with, restrains, or coerces employees in the exercise of these rights.

WE WILL NOT make statements to employees linking employee union activity to the failure to rehire employees and we will not tell employees that dissention will not be tolerated.

WE WILL NOT refuse to hire or rehire applicants on the basis of their union affiliation or other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer immediate employment to Mark Shean to the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

WE WILL make Mark Shean whole for any loss of earnings and other benefits suffered as a result of our unlawful failure and refusal to hire him, with interest.

WE WILL, within 14 days of this Order, remove from our files any reference to the unlawful failure and refusal to hire Mark Shean and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful failure and refusal to hire will not be used against him in any way.

_____
THE WACKENHUT CORPORATION

Dated _____ By _____
(Representative) (Title)

JD–56–06
Plymouth, MA

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072

Hours of Operation: 8:30 a.m. to 5 p.m.

617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.